STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF RICHMOND, Plaintiff-Appellant,	UNPUBLISHED April 20, 2010
v	No. 288625 Macomb Circuit Court
RONDIGO, LLC, Defendant-Appellee.	LC Nos. 2006-001054-CZ; 2006-004429-CZ

TOWNSHIP OF RICHMOND, Plaintiff-Appellee,	
v	No. 290054 Macomb Circuit Court
RONDIGO, LLC, Defendant-Appellant.	LC Nos. 2006-001054-CZ; 2006-004429-CZ

Before: MURPHY, C.J., and JANSEN and ZAHRA, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I concur in the majority's conclusion that the circuit court erred by ruling that the title-object clause of Const 1963, art 4, § 24 applied to the Richmond Township (township) engineering standards ordinance. I further concur in the majority's conclusion that because MCL 286.473b uses the term "may," a circuit court's decision whether to award costs, expenses, and attorney fees pursuant to that statute is discretionary. See *Murphy v Ameritech*, 221 Mich App 591, 600; 561 NW2d 875 (1997); see also *Goldstone v Bloomfield Twp Pub Library*, 268 Mich App 642, 657-658; 708 NW2d 740 (2005). Lastly, I concur in the majority's determination that, pursuant to MCL 286.473b, Rondigo was entitled to recover its reasonable and actual costs, expenses, and attorney fees incurred in defending that portion of the litigation that addressed whether its composting activities constituted a nuisance.

However, I must respectfully dissent from the majority's determination that the circuit court erred by ruling that § 4.12(A) of the township zoning ordinance and § IV-1(I)(2) of the township engineering standards ordinance were unconstitutional. For the reasons that follow, I conclude that both of these challenged ordinance provisions are unconstitutionally vague and

therefore void. I also dissent from the majority's determination that Rondigo was not entitled to recover its reasonable and actual costs, expenses, and attorney fees incurred in defending that portion of the litigation that challenged its two access roads.

In my opinion, the circuit court correctly ruled that § 4.12(A) of the township zoning ordinance and § IV-1(I)(2) of the township engineering standards ordinance were unconstitutional and therefore unenforceable against Rondigo.

I fully acknowledge that all ordinances are presumed to be constitutional and are construed as such unless their unconstitutionality is clearly apparent. *Houdek v Centerville Twp*, 276 Mich App 568, 573; 741 NW2d 587 (2007). However, I also note that the due process clause of the Fourteenth Amendment prohibits ordinances that are excessively vague or uncertain, *Independence Twp v Murdoch*, 155 Mich App 770, 774; 400 NW2d 714 (1986); *Dearborn v Smith*, 75 Mich App 64, 69; 254 NW2d 654 (1977), and that the presumption of constitutionality afforded to zoning ordinances "cannot prevail against unconstitutionality patent on the face of the ordinance itself," *Osius v St Clair Shores*, 344 Mich 693, 699; 75 NW2d 25 (1956). An ordinance that lacks precise standards is incapable of objective measurement. *Soof v Highland Park*, 30 Mich App 400, 408; 186 NW2d 361 (1971). It is fundamental that a local ordinance must "give an ordinarily intelligent person a reasonable opportunity to know what is prohibited so that he may act accordingly." *West Bloomfield Charter Twp v Karchon*, 209 Mich App 43, 53; 530 NW2d 99 (1995); see also *Grayned v City of Rockford*, 408 US 104, 108-109; 92 S Ct 2294; 33 L Ed 2d 222 (1972).

A zoning ordinance must contain sufficiently specific standards to guide the exercise of discretion by the local authorities. *Osius*, 344 Mich at 700; *Homrich v Storrs*, 372 Mich 532, 540-541; 127 NW2d 329 (1964); *Karchon*, 209 Mich App at 54. An ordinance that does nothing more than give the local authorities the power to approve or reject a use or activity after holding a public hearing is "fatally defective," *Osius*, 344 Mich at 700, and unconstitutional on its face, *Michigan Nat Bank v Windsor Charter Twp*, 86 Mich App 35, 38; 272 NW2d 330 (1978). Nor may a zoning ordinance be saved from unconstitutionality by "broad statements as to the public health, safety, and general welfare, since such statements afford no sufficient guide" for the local authorities in the exercise of their discretion. *Osius*, 344 Mich at 699. "'While the exercise of discretion and judgment is to a certain extent necessary for the proper administration of zoning ordinances, this is so only where some standard or basis is fixed by which such discretion and judgment may be exercised.'" *Id*. at 700 (citation omitted). "Without definite standards an ordinance becomes an open door to favoritism and discrimination . . . ." *Id*.

Section 4.12(A) of the township zoning ordinance provides:

> Sec. 4.12. Nonresidential driveways.
>
> A. Non-residential driveways, entrances and exits shall be subject to approval by the Macomb County Road Commission, the Michigan Department of Transportation, where applicable, and by the Planning Commission after considering the effects on the surrounding property, pedestrian and vehicular traffic and the movement of emergency vehicles.

At the outset, I question whether § 4.12(A) is even applicable to Rondigo's east and west access roads in the first instance. Section 18.01 of the township zoning ordinance defines the term "driveway" as "[a] private access from a public road to a building or buildings." The uncontroverted evidence at trial established that neither of Rondigo's two roadways provided access to a building or buildings. Accordingly, pursuant to § 18.01, it seems that neither of Rondigo's roadways qualifies as a driveway of any kind—non-residential or not. Because § 4.12 governs only non-residential *driveways*, I conclude that § 4.12(A) is likely inapplicable to Rondigo's two roadways in the first place.[1]

But even if § 4.12(A) of the zoning ordinance otherwise applies to the farm access roads at issue here, I conclude that the circuit court properly determined that the ordinance is unconstitutionally vague. The township argues, and the majority concludes, that the language "after considering the effects on the surrounding property, pedestrian and vehicular traffic and the movement of emergency vehicles" provides sufficient standards to guide the township's discretion in each case by requiring the township to consider a proposed non-residential driveway's possible impact on neighboring properties and area traffic patterns, by requiring the township to look into any possible traffic-safety consequences, and by requiring the township to determine whether a proposed driveway would impede the flow of emergency vehicles. However, irrespective of whether § 4.12(A) requires the township authorities to consider these factors before granting permission to construct a non-residential driveway, I note that § 4.12(A) does not contain any definite standards explaining how these factors should be considered or how much weight each factor should receive. In addition, the ordinance does not specify the manner in which each of these factors should be taken into account in the ultimate decision whether to grant or deny permission for a non-residential driveway. Furthermore, § 4.12(A) contains no standards that are specific to the proposed non-residential driveway, itself. For instance, it does not specify the acceptable size, shape, thickness, composition, or grading of a permissible non-residential driveway. Nor does § 4.12(A) purport to limit the township's discretion in any way by providing examples of the types of non-residential driveways that would ordinarily be permitted. In short, I conclude that § 4.12(A) of the zoning ordinance wholly fails to provide sufficient standards necessary to guide its administration and to give adequate notice of the subject matter that it regulates. *Karchon*, 209 Mich App at 53-54; see also *Roseland Inn, Inc v McLain*, 118 Mich App 724, 731; 325 NW2d 551 (1982) (holding that "the

[1] The majority concludes that my analysis in this regard is somehow incorrect because although the township zoning ordinance defines "driveway," it does not define "non-residential driveway." The majority states that it is "arguable whether it is proper to rely solely on a definition of 'driveway' for purposes of defining 'non-residential driveways,' given the addition of the adjective 'non-residential.'" I am unpersuaded by the majority's statement. It is true that the adjective "non-residential" modifies the noun "driveways." But it does not necessarily follow that the modified noun "driveways" loses its essential underlying meaning. Instead, according to basic principles of English grammar and style, the term "non-residential driveways" simply encompasses and describes a *subset* of "driveways"—namely, those that are not residential. The definition of "driveway" continues to apply even to those driveways that are "non-residential" in nature.

absence of standards promotes arbitrary and capricious actions" and that "the lack of fair notice of such standards violates [an applicant's] right to due process").

Of course, it is true that a zoning ordinance need not be absolutely definite in every minute detail, and that the language of an ordinance "need only be reasonably precise." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 343; 675 NW2d 271 (2003). All that is required is that the ordinance contain standards that are "'fair and equitable, capable of explanation and understanding, and most of all, determined and announced in advance of their being instituted.'" *Roseland Inn*, 118 Mich App at 732 (citation omitted). But in my opinion, the language and requirements of § 4.12(A) cannot even be considered "reasonably precise." For example, unlike the zoning ordinance at issue in *Bruni v Farmington Hills*, 96 Mich App 664, 667-668; 293 NW2d 609 (1980), § 4.12(A) does not contain a list of standards to be evaluated before determining whether the proposed land use would qualify for approval. Similarly, although the zoning ordinance at issue in *Florka v Detroit*, 369 Mich 568, 570-580; 120 NW2d 797 (1963), purported to allow junkyards upon a determination that they would not be "injurious to the surrounding neighborhood and not contrary to the spirit and purpose of this ordinance," the local legislative body in that case also "expressly indicated certain standards that should be observed by the plan[ning] commission in passing on applications under the provision."

In contrast, when enacting § 4.12(A) of the zoning ordinance at issue here, the Richmond Township board of trustees provided no such express standards to be considered by the planning commission in determining whether to permit a non-residential driveway. Indeed, the township implicitly admits this absence of precise standards in its brief on appeal, wherein it speculates that the planning commission "could" consider matters such as "proximity to adjoining residences, effect on drainage, dust, noise, etc." when deciding whether to permit a non-residential driveway under § 4.12(A). On the record before this Court, I conclude that § 4.12(A) contains no precise standards relating to the subject matter that it purports to regulate. Thus, § 4.12(A) effectively grants the township unfettered discretion to grant or withhold permission for any proposed non-residential driveway. "This is constitutionally impermissible." *Karchon*, 209 Mich App at 54. I conclude that the circuit court properly determined that § 4.12(A) of the township zoning ordinance contains insufficient standards and is unconstitutional on its face.[2]

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[2] The township also argues that the circuit court erred by ruling that the zoning ordinance does not require an individual to submit a site plan before constructing a non-residential driveway. I believe that the circuit court's ruling on this issue was correct. Section 4.07 of the township zoning ordinance, pertaining to fences, specifies that a site plan must be submitted before certain types of fences may be constructed. In contrast, § 4.12(A) contains no requirement that a site plan be submitted. This omission of a site-plan requirement from § 4.12(A) must be construed as intentional. See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993); *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005). Moreover, § 3.02 of the zoning ordinance lists the particular conditions under which a site plan must be submitted. As the circuit court correctly observed, the construction of an access road or a non-residential driveway is not contained in this list of particular conditions. This Court must not read into § 3.02 a provision that was not included there by the township board of trustees. See (continued…)

I also conclude that the circuit court correctly ruled that § IV-1(I)(2) of the township engineering standards ordinance was unconstitutional, albeit for an incorrect reason. The specific provision at issue, § IV-1(I)(2), provides:

> Number of Driveways. The number of non-residential driveways to a major or secondary road shall be limited to the minimum necessary. Shared commercial and industrial driveways are encouraged, subject to the approval of a reciprocal access easement and maintenance agreement between all property owners. The number of driveways allowed shall be determined by the Planning Commission as part of site plan review based on the use of the site and circulation patterns.

As noted previously, I agree with the majority that the circuit court erred by determining that the title-object clause of Const 1963, art 4, § 24 applied to the township engineering standards ordinance. It is well settled that the title-object clause applies only to acts of the Legislature, and not to local ordinances. *Melconian v Grand Rapids*, 218 Mich 397, 412; 188 NW 521 (1922); *Hughes v Detroit*, 217 Mich 567, 573; 187 NW 530 (1922); *People v Wagner*, 86 Mich 594, 597; 49 NW 609 (1891).[3] But I conclude that the circuit court reached the correct result, albeit for the wrong reason, when it ruled that § IV-1(I)(2) of the engineering standards ordinance was unconstitutional.

It is apparent that the definitions contained in § 18.01 of the township zoning ordinance do not apply to the engineering standards ordinance. Accordingly, I conclude that even if Rondigo's access roads do not constitute "non-residential driveways" within the meaning of the zoning ordinance, they may still qualify as "non-residential driveways" for purposes of § IV-1(I)(2) of the engineering standards ordinance. I will proceed with the assumption that Rondigo's access roads do, indeed, constitute "non-residential driveways" within the meaning of § IV-1(I)(2), even though they might not otherwise qualify as such under the zoning ordinance.

However, even assuming that Rondigo's access roads do constitute "non-residential driveways" for purposes of the engineering standards ordinance, I conclude that § IV-1(I)(2) provides no meaningful standards to guide the exercise of discretion by township officials. *Osius*, 344 Mich at 700; *Karchon*, 209 Mich App at 54. Although § IV-1(I)(2) requires the planning commission to review "the use of the site and circulation patterns" before determining the number of allowable non-residential driveways, it does not specify how these factors should

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Risk v Lincoln Charter Twp, 279 Mich App 389, 404; 760 NW2d 510 (2008).

[3] Although *Melconian*, *Hughes*, and *Wagner* were all decided before the adoption of the Michigan Constitution of 1963, the present title-object clause of Const 1963, art 4, § 24 is identical to the title-object clauses contained in the Michigan Constitutions of 1908 and 1850. See Const 1908, art 5, § 21 (stating that "[n]o law shall embrace more than one object, which shall be expressed in its title"); Const 1850, art 4, § 20 (stating that "[n]o law shall embrace more than one object, which shall be expressed in its title"). Moreover, contrary to Rondigo's assertion on appeal, this Court's opinion in *Independence Twp v Roy*, 12 Mich App 107; 162 NW2d 339 (1968), provides it no assistance on appeal. Indeed, the *Roy* Court explicitly declined to consider "whether Const 1963, art 4, § 24 applies to municipal ordinances . . . ." *Id*. at 110.

be considered or how the planning commission should reach its ultimate determination in any particular case. In practical effect, § IV-1(I)(2) of the engineering standards ordinance is incapable of objective measurement and grants the township the power to arbitrarily determine the number of permissible non-residential driveways in any given situation. As explained earlier, this is not constitutionally acceptable. *Karchon*, 209 Mich App at 54.

Because § IV-1(I)(2) contains no certain standards concerning the subject matter that it purports to regulate, and does not define the scope of the township's authority with respect to the approval of non-residential driveways, I conclude that it is facially unconstitutional and may not be enforced against Rondigo. *Osius*, 344 Mich at 699-700. It is axiomatic that this Court should not reverse when the circuit court has reached the correct result, even if it has done so for the wrong reason. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006); *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

I also conclude, contrary to the majority's opinion, that Rondigo was entitled to recover its reasonable and actual costs, expenses, and attorney fees incurred in defending the township's two lawsuits *in their entirety*—including that portion of the litigation that pertained to Rondigo's two access roads. Section 3b of the Right to Farm Act (RTFA), MCL 286.473b, provides:

> In any nuisance action brought in which a farm or farm operation is alleged to be a nuisance, if the defendant farm or farm operation prevails, the farm or farm operation may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees.

Because MCL 286.473b uses the term "may" instead of "shall," the grant or denial of costs, expenses, and attorney fees is discretionary with the court. See *Murphy*, 221 Mich App at 600; *Goldstone*, 268 Mich App at 657-658. This is not to say, however, that any underlying findings of fact or questions of law are subject to the same abuse-of-discretion standard on appeal. Consistent with well-settled law, I conclude that any factual findings on which the court's ultimate award is based should be reviewed for clear error, and any underlying questions of law on which the award is based should be reviewed de novo. See *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

By its own terms, MCL 286.473b applies to "any nuisance action brought *in which a farm or farm operation is alleged to be a nuisance* . . . ." (Emphasis added.) The RTFA defines "[f]arm operation" as "the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products . . . ." MCL 286.472(b). In particular, the RTFA specifies that a "[f]arm operation" includes, among other things, "[t]he generation of noise, odors, dust, fumes, and other associated conditions," MCL 286.472(b)(*ii*), and "[t]he operation of machinery and equipment necessary for a farm . . . and the movement of vehicles, machinery, equipment, and farm products and associated inputs necessary for farm operations on the roadway," MCL 286.472(b)(*iii*). In my opinion, these definitions clearly encompass the construction and maintenance of farm access roads, which are not only necessary to "[t]he operation of machinery and equipment necessary for a farm," but are also necessary to "the movement of vehicles, machinery, equipment, and farm products . . .on the roadway."

Moreover, I believe that the circuit court clearly erred when it stated that there was "no issue . . . presented as to any farming operation" at trial. It was undisputed that Rondigo had used the property for farming in the past. I have thoroughly reviewed the record, and note that there was ample evidence presented at trial to establish that farm equipment could not access the north end of Rondigo's farm in the absence of the two crushed concrete roadways. Such farm equipment was a necessary component of Rondigo's farming activities.[4]

Because the two crushed concrete farm access roads were an essential component of Rondigo's "[f]arm operation," see MCL 286.472(b)(*iii*), and were "alleged to be a nuisance" for purposes of MCL 286.473b, I conclude that Rondigo was entitled to recover its reasonable and actual costs, expenses, and attorney fees incurred in defending that portion of the litigation that pertained to its two access roads.[5]

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[4] In addition, I cannot conclude that compliance with the generally accepted agricultural management practices (GAAMPs) is a necessary precondition to a farm defendant's recovery of costs, expenses, and attorney fees under MCL 286.473b. As the township points out, MCL 286.473(1) provides that "[a] farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural management practices according to policy determined by the Michigan commission of agriculture." Standing alone, MCL 286.473(1) might seem to suggest that the only way in which a farm defendant can avail itself of the protections of the RTFA—including MCL 286.473b—is by proving that it is in compliance with the GAAMPs. But MCL 286.473(1) does not exist in isolation. For example, MCL 286.473(2), which does not mention the GAAMPs, provides that "[a] farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation existed before a change in the land use or occupancy of land within 1 mile of the boundaries of the farm land, and if before that change in land use or occupancy of land, the farm or farm operation would not have been a nuisance." In other words, MCL 286.473(2) provides *additional* protections for farm defendants, *irrespective of their compliance with the GAAMPs*. Thus, the township is simply incorrect in arguing that a showing of compliance with the GAAMPs is always necessary before a farm defendant may avail itself of the protections of the RTFA. Quite simply, although some provisions of the RTFA are conditioned on compliance with the GAAMPs, other provisions of the RTFA are not. And MCL 286.473b is one of the provisions that is *not* conditioned on compliance with the GAAMPs. Significantly, MCL 286.473b contains no language regarding the GAAMPs or requiring compliance therewith. Had the Legislature intended to condition a farm defendant's recovery of costs, expenses, and attorney fees under the RTFA on compliance with the GAAMPs, it could have specifically included language in MCL 286.473b to that effect. See *Kurz v Michigan Wheel Corp*, 236 Mich App 508, 512-513; 601 NW2d 130 (1999). However, it did not, and this Court must not read into a statute language that was not included by the Legislature. *Risk*, 279 Mich App at 404. For these reasons, I conclude that compliance with the GAAMPs is *not* a necessary precondition for a successful farm defendant to recover its costs, expenses, and attorney fees under MCL 286.473b.

[5] For the reasons stated previously, I have concluded that § 4.12(A) of the township zoning ordinance and § IV-1(I)(2) of the township engineering standards ordinance are unconstitutional and therefore unenforceable against Rondigo. Accordingly, I simply cannot agree with the majority's statement that "Rondigo cannot be properly designated as the prevailing party under

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I would affirm the circuit court's determination that § 4.12(A) of the township zoning ordinance and § IV-1(I)(2) of the township engineering standards ordinance are unconstitutional and therefore unenforceable against Rondigo. Although the circuit court partially relied on incorrect reasoning in this regard, it reached the right result.

I would reverse the circuit court's determination that MCL 286.473b was inapplicable in this case and remand for an award of Rondigo's actual and reasonable costs, expenses, and attorney fees. Unlike the majority, I would not limit this award to Rondigo's costs, expenses, and attorney fees incurred in defending that portion of the litigation that addressed whether its composting activities constituted a nuisance. I would also direct the circuit court to award Rondigo its costs, expenses, and attorney fees incurred in defending that portion of the litigation that pertained to its two farm access roads.

/s/ Kathleen Jansen

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MCL 286.473b, given the failure to seek approval of its construction plans under § 4.12(A) . . . and the failure to timely submit a site plan application under § IV-1(I)(2) . . . ."